IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted] 624

JOACHIM HENDRIK FISSER, Her Engines, Tackle, Apparel, etc.,

Cross-Petitioner,

AGAINST

NACIREMA OPERATING CO., INC.,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CROSS-PETITIONER

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CASES CITED

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BRIEF FOR CROSS-PETITIONER

The case of the cross-petitioner comes before this Court conditioned on whether or not the relief prayed for in No. 968 is granted the petitioner in No. 968. Inasmuch as in No. 968 the Court of Appeals for the Third Circuit dismissed the libel because it found (concurrently with the District Court) that "The sole, active or primary cause" of the accident was the negligence of the stevedores, the question presented on this cross-petition will not be material except if the decision of the Court of Appeals should be reversed. In such event this Court is requested to review the question of the right of the cross-petitioner to indemnity against the employer of the petitioner in No. 968 and award full indemnity.

Opinions Below

The opinion of the United States District Court for the District of New Jersey is officially reported at 142 F. Supp. 389. The opinion of the United States Court of Appeals for the Third Circuit, reversing the decision of the District Court and dismissing the libel, is reported at 249 F. 2d 818. The opinion of the United States Court of Appeals for the Third Circuit, denying libelant's petition for a rehearing, is reported at 249 F. 2d 821.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 30, 1957. The order denying rehearing was entered on December 5, 1957. On March 1, 1958, by order of Mr. Justice Brennan, the time within which to file a cross-petition for certiorari was extended to May 2, 1958 (R. 132). The peti-

tion was filed May 2, 1958 and was granted June 9, 1958 (R. 133). The jurisdiction of this Court rests on 28 U. S. C. Section 1254 (1).

Question Presented

Whether a stevedore contractor who enters into a written contract to unload a vessel specifically named in the contract and to that end agrees to provide such labor and supervision as is needed for the proper and efficient conduct of this work can escape liability for indemnity where its negligence in the manner in which it conducted the work is the sole, active or primary cause of the accident, solely because the party with whom the stevedore made the contract was the agent of the time charterer of the vessel rather than the owner himself?

Statement of the Matter Involved

On January 2, 1954 John Crumady, a longshoreman in the employ of Nacirema Operating Co. Inc. was injured on board the *S. S. Joachim Hendrik Fisser* when a boom fell when the topping lift supporting it broke because it was subjected to excessive strain as the libelant and his fellow employees were attempting, by the continued application of power to the ship's electric winch to lift a timber, which they had caused to become jammed or drawn against the under edge of the hatch coaming. On January 4, 1952 suit on behalf of Crumady was commenced by the filing of a libel and the attachment *in rem* of the *S. S. Joachim Hendrik Fisser*. On January 5, 1952 the Master of the vessel filed claim to said vessel on behalf of its owner, Hendrik Fisser Aktien Geselschaft. Other than as claimant, Hendrik Fisser Aktien Geselschaft was not required to appear in the action.

On the filing of the answer as claimant of the *S. S. Joachim Hendrik Fisser,* Hendrik Fisser Aktien Gesellschaft, in its capacity as claimant filed a petition impleading Nacirema Operating Co., Inc., the contract stevedore and libelant's employer, pursuant to the 56th Admiralty Rule of this Court.

On December 30, 1953, prior to the occurrence of Crumady's accident, Nacirema Operating Co., Inc. entered into a written agreement under which it agreed to discharge the *S. S. Joachim Hendrik Fisser,* on the occasion in question. This contract was made with Insular Navigation Company, agents for the time charterer of the *S. S. Joachim Hendrik Fisser.*

This agreement in part specified as follows:

> "This agreement, • • •, will govern the discharging and/or loading of vessels owned, operated or otherwise controlled by Insular Navigation Company at the Port of Port Newark, New Jersey effective December 30, 1953 and *the contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the contractor, at the agreed rates, terms, and conditions specified below:*
>
> DISCHARGING
>
> 285,000 Broad Feet Nicaraguan Pine from *M. V. 'Joachim Hendrik Fisser'* scheduled to arrive Port Newark January 2.
>
> • • • • •
>
> 2. Commodity Rate Inclusions: As part of the foregoing specified rates, the Contractor Agrees to include in the commodity rates the following described services:
>
> • • • • • •

(b) Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock crane operators, also foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work."

On June 27, 1956 after trial, the District Court rendered its decision allowing Crumady recovery against the vessel and awarded the vessel full indemnity against Nacirema Operating Co., Inc.

Although it concluded that "the sole, active or primary cause of the breaking of the topping lift" was the negligence of the longshoremen by reason of the negligent manner in which they attempted to extract a timber from the obstructed position beneath the deck of the vessel, the trial court nevertheless held the vessel liable on the theory that this failure to exercise reasonable care brought into play an allegedly unseaworthy condition of the vessel.

In allowing indemnity the trial court pointed out that even though the stevedore contractor had not made a contract directly with the owner of the vessel, its employees were impliedly, if not expressly, invited to come and be aboard the vessel for the purpose of unloading her cargo and to use the vessel's tackle and gear *in a manner appropriate for that purpose.* In consequence to this relationship to which the stevedore contractor had consented, the trial court held that it owed the vessel and her owners the duty of using due care in her unloading entirely apart from its obligation under the contract which it had made with the agent of the charterer of the vessel.

On appeal to the Court of Appeals for the Third Circuit by all of the parties to the action, the Court of Appeals reversed the District Court and dismissed the libel. The Appellate Court concurred with the trial court that the neg-

ligence of the stevedores was "the sole, active or primary cause" of the accident. It pointed out that "the concept of seaworthiness contemplates no more than a ship's gear shall be reasonably fit for its intended purpose." If found on the basis of mathematical calculations and a Coast Guard regulation that the ship's gear was in all respects fit for its intended purpose and that in the absence of anything which suggested that the misuse of the ship's gear was reasonably to be feared or anticipated, there was no basis for finding the vessel unseaworthy. It further pointed out that the ship's gear was thus not proved to be unseaworthy and that the setting of the cut-off device was not established as the legal cause of the accident which occurred.

Thereafter the petitioner in No. 958 filed a petition for a rehearing. In that petition the petitioner contended that if the sole cause of the accident was defective rigging by the longshoremen, the vessel should nevertheless be held liable. The Court of Appeals after pointing out that the theory advanced on the rehearing had not been advanced in the trial court or before in the appellate court, denied this petition on the ground that it found no merit in this or any other contention which could warrant a rehearing. Chief Judge Biggs, who did not participate in the initial appeal, filed a dissenting opinion suggesting a rehearing before the court in banc. Judge Bigg's suggestion completely overlooked the vital fact that when the accident occurred the longshoremen were putting the ship's gear to a use for which it was not intended and therefore was based on the sole premise that the accident occurred only because the stevedore crew had wrongly positioned the boom so that too great a strain was put on the boom and the topping lift.

Summary of Argument

If this court should reverse in No. 968 and allow the petitioner recovery against the vessel, it should under the circumstances of this case allow the vessel indemnity against the stevedore employer of the petitioner. The liability of the stevedore contractor for indemnity is not sought upon the basis of a duty which it and the shipowner owed to the petitioner, but arises solely from the duty which the stevedore contractor assumed in consequence of a relationship to which the stevedore contractor had consented. The stevedore contractor having assented to this relationship, cannot reject the responsibilities which such a relationship entails, solely because of the technicality that it came aboard and unloaded the vessel in question by reason of a written contract which the charterer's agent and not the owner itself signed. It is in a no better position with respect to such vessel than the stevedore contractor whose agreement is signed by the owner of that vessel.

On the other hand, the absence of a contractual relation does not in every instance preclude indemnity. The right to indemnity is recognized where the indemnitor and the indemnitee are not *in pari delicto*. It should all the more be recognized in cases where liability is visited on the shipowner where he may be without fault as the petitioner in No. 968 contends.

ARGUMENT

I

In the event of a reversal of the dismissal of the libel in No. 968, the cross-petitioner is entitled to indemnity from the stevedore contractor to the full extent of petitioner's recovery.

There is no question that the Nacirema Operating Co., Inc., entered into a contract to discharge lumber from the *S. S. Joachim Hendrik Fisser*, at the time in question and that under such contract it not only warranted but specifically agreed that it would provide the necessary labor and supervision as might be needed for the proper and efficient conduct of this work. This contract was not restricted to vessels owned or operated by Insular Navigation Company, but included all such vessels which might otherwise be controlled by Insular and as might be assigned to Nacirema and particularly the *S. S. Joachim Hendrik Fisser*. Thus Nacirema did not merely assume a duty to the *S. S. Joachim Hendrik Fisser* by reason of the fact that its employees went on board the vessel, as the trial court held, but it specifically agreed that in unloading this vessel the labor and supervision it would furnish would be such as was necessary for the proper and efficient conduct of the work.

The warranty which the Court in *Ryan Stevedoring Co.* v. *Pan Atlantic S. S. Corp.*, 350 U. S. 124, 133-134, said a stevedore owes when he goes aboard a vessel to perform stevedoring services, is comparable to a manufacturer's warranty of the soundness of its manufactured product. Such warranty is not limited only to those with whom the warrantor is in direct privity. *MacPherson* v. *Buick*, 217

N. Y. 382. As was pointed out in *Cornec* v. *Baltimore & O. R. Co.*, 4 Cir., 48 F. 2d 497, 502 (cited with approval by this Court in *Wyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563) the stevedore owes to the vessel and her owner the duty of using due care and when it fails to do so there is no known principle upon which the stevedore can be absolved for damages that are sustained as the result of the failure to use due care. Mere lack of direct privity is not such a principle as would absolve the stevedore under the facts in this case. Nor is the fact that the stevedore contractor was covered under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 901 *et seq.*, serve to work a surrender of the rights which a third-party might have against Nacirema. This court's statement in *Crowell* v. *Benson*, 285 U. S. 22, 38, is significant. There it was stated:

> "• • • it (the Longshoremen's Act) applies only when the relation of master and servant exists, Sec. 3."

It is not essential in order to give rise to the right to indemnity that the contract for the stevedoring services be directly between the indemnitor and indemnitee. Indemnity springs from an equitable doctrine. It is not dependent upon the legislative will but springs from contract, express or implied. *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314. As the Court of Appeals for the Ninth Circuit in *States S. S. Co.* v. *Rothschild Stevedoring Co.*, 205 F. 2d 253, stated:

> "The fact that the permission to the stevedore company comes from the owner through the charterer does not relieve the stevedore company from liability."

Furthermore, to say that a stevedore contractor is required to render its services with competency and safety only if the shipowner hires him directly does violence to the very nature of the service which is undertaken. Competency and safety are inescapable elements of such service and it is impossible to divorce one from the other. In describing the inescapable nature of the duties which the performance of stevedoring service entails, this Court, in *Ryan Stevedoring Co.* v. *Pan Atlantic S. S. Corp.*, 350 U. S. 124, stated at page 133:

> "It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

The fallacy inherent in any requirement that a direct contract is necessary in order to hold the stevedore contractor which created the condition that produced the injury liable for indemnity is emphasized when it becomes apparent that the vessel was held liable *in rem* in this case. As a practical matter, if such a requirement were carried to its ultimate conclusion, the vessel, though encumbered with a maritime lien because of the wrongful act of the stevedore, nonetheless could have no redress from the stevedore whose acts created the lien because the vessel physically was incapable of making the contract. Because of the very nature of the shipping business, the requirement that a direct contract with the owner must exist in order to enable the vessel or its owner to obtain redress for damage to the vessel would be very onerous indeed. From ancient times, the maritime law has imposed a contractual relationship between the vessel and the contracting party even though the contract made on

behalf of the vessel is made by someone else other than the owner. *Benedict on Admiralty*, 6th Ed., Vol. 1, p. 23. There is no more reason for absolving the stevedore from indemnity because it did not have a direct contract with it or the owner than there would be for absolving the vessel for any breach of a contract made on its behalf.

The weight of authority, therefore, supports the allowance of indemnity if the vessel should be held liable for damages here.

II

Under the facts of this case, the right to indemnity exists even in the absence of a direct contract between the stevedore contractor and the shipowner.

If the Court of Appeals should be reversed and recovery against the vessel allowed, no matter on what theory, the situation which exists under the facts of this case is not one in which the stevedore's breach of duty brings about injuries by operation upon a prior condition caused by the ship's negligence or unseaworthiness but instead one which the stevedore's breach of duty creates. Under these circumstances, indemnity is not sought on the theory of active or passive negligence but instead on the basis that the one whose acts by operation of law cast another in damages should indemnify him who has been compelled to pay. In such circumstances, the Courts have with unanimity recognized the right to indemnity regardless of whether or not there may have been a contractual obligation running from the indemnitor to the indemnitee. *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316; *Union Stockyards Co.* v. *Chicago B & O R. R. Co.*, 196 U. S. 217; *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489; *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946. This is in conformity with the holding of the trial court.

Conclusion

If the Court of Appeals should be reversed in No. 968, this Court should grant indemnity to the vessel which is the cross-petitioner herein against the stevedore contractor. Whatever liability may be visited on the vessel was caused and brought about by the failure of the stevedore to do its work in a safe and competent manner. The vessel's liability exists only by operation of law. The loss should, therefore, be placed upon the one who created the condition which caused the accident.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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